NO. 21855
21855A

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAVIER CARBAJAL-PORTILLO,
RAFAEL VEGA-PICOS,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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I

JURISDICTIONAL STATEMENT

This is an appeal from the Judgment of the United States District Court for the Southern District of California, adjudging both appellants to be guilty as charged in all three counts of the indictment, following trial by jury (C.T. 15, 16).[1]

The offenses occurred in the Southern Division of the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 3231 and Title 21, United States Code, Section 174. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

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[1] "C.T." refers to the Clerk's Transcript.

II

STATEMENT OF THE CASE

Both appellants were charged in each count of a three-count indictment returned on July 20, 1966, by the Federal Grand Jury for the Southern District of California, Southern Division (C.T. 5).

The first count alleged that on June 10, 1966, both appellants knowingly imported and brought approximately sixteen ounces of heroin into the United States contrary to law. (C.T. 5).

The second count alleged that on June 10, 1966, both appellants knowingly concealed and facilitated the transportation and concealment of approximately sixteen ounces of heroin which the appellants knew had been imported and brought into the United States contrary to law. (C. T. 6).

The third and last count alleged that on June 10, 1966, both appellants knowingly and unlawfully sold and facilitated the sale to Ernest Halcon of approximately sixteen ounces of heroin which both appellants knew had been imported into the United States contrary to law. (C. T. 7).

Jury trial of both appellants commenced on September 7, 1966, as to all three counts before United States District Judge Luther W. Youngdahl. (C. T. 10). Both appellants were found guilty of all three counts on September 12, 1966 (R. T. 15, 16).[2/]

Thereafter on September 30, 1966, appellant Carbajal was sentenced to five years on Count One, and five years on Counts Two and Three to run concurrently to each other and consecutive to Count One, making a total of

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[2/] "R.T." refers to the Reporter's Transcript.

ten years (C.T. 17), and on September 30, 1966, appellant Vega was sentenced to five years on each of Counts One, Two and Three to run concurrently, making a total of five years.

Both appellants thereafter filed a notice of appeal on November 7, 1966. (C. T. 22, 23).

III

ERROR SPECIFIED

1. The Court erred as a matter of law in not granting appellant Carbajal's motion for dismissal, on the grounds of entrapment.

2. The Court erred in denying appellant Vega's motion for a new trial which was based on the grounds that the government had failed to sustain its burden of proving that appellant Vega had knowledge or possession of the drug.

IV

STATEMENT OF THE FACTS

Ernest Halcon, an agent for the California Department of Justice, Bureau of Narcotic Enforcement, met with appellant Carbajal on June 9, 1966, at 9:45 p.m., in front of Kresge's, 200 block on First Avenue, Calexico, California. (R. T. 32, 33).

He had been instructed by Leland Riggs, Customs Agent, to proceed to that location at 9:30 p.m. and that a person would appear there who would ask for Rico and would possibly have some heroin to sell (R.T.43, 45). Agent Riggs had received this information from a reliable and confidential informant (R.T. 112).

Appellant Carbajal approached Halcon, working undercover, at 9:45 p.m. in the company of an unidentified person who Carbajal explained "was alright". (R.T. 33, 40).

Carbajal asked Halcon if his name was Rico. Halcon answered in the affirmative. Carbajal asked if Halcon was interested in purchasing a good quantity of "cheva". (R.T. 33). "Cheva" means heroin (R.T. 39).

Halcon said he was if the price was right and asked appellant Carbajal how much was involved. Carbajal said twenty-two ounces at $350.00 per ounce. (R.T. 34). This is a fair price in quantities. (R.T. 41). Halcon ordered sixteen ounces at that price for delivery June 10 (the following day) at 12:30 p.m. at First and Pauline Streets in Calexico. Carbajal then departed in the direction of the border. (R.T. 34).

The next day Halcon was at First and Pauline Streets in Calexico at 12:30 p.m. and appellant Carbajal was already there. Carbajal said the "cheva" (heroin) would arrive by water truck shortly, then inquired if "Rico" wanted European heroin at $12,000 per kilo (R.T. 35). Halcon testified this was about forty ounces and a fair price in that quantity (R.T. 41). He said it would take three weeks to a month. Carbajal added that his brother in Mazatlan raises poppies. (R. T. 35).

Carbajal departed at 12:52 p.m. for the stated purpose of locating his associate who was overdue with the "cheva". Halcon said he would meet Carbajal at 2:30. Appellant walked toward Mexico (R.T. 35).

Halcon returned to First and Pauline Streets at 2:30 p.m. Carbajal appeared at 2:45 p.m. on foot and announced the "cheva" is here and asked

"Rico" (Halcon) if he had the money. Halcon said the money was in the trunk and asked if the stuff was there. (R.T. 36).

Appellant Vega was standing six to seven feet away. (R.T. 50). Vega is a water truck driver and crosses up to three times a day (R.T. 136, 139). He answers "The thing is in the car," - pointing toward a car. (R. T. 36).

Carbajal and Halcon drove over to the car (R. T. 36). Halcon said to Vega "Is it all there?" to which Vega replied "I will get it."

Vega joined Carbajal at the rear of the Chevrolet automobile, the trunk was opened (R.T. 36, 76) and Halcon observed them engage in conversation (R.T. 36).

Carbajal returned to Halcon's car with a coffee can containing three rubber containers.

Halcon began counting out the money to pay for the heroin and gave a signal to the surveilling officers who arrested both appellants and undercover agent Halcon. (R.T. 37).

V

ARGUMENT

A. APPELLANT CARBAJAL WAS NOT ENTRAPPED.

Entrapment is usually a question of fact, not of law. See:

Enciso v. United States, 370 F.2d 749 (9th Cir. 1967).

Masciale v. United States, 356 U.S. 386 (1958).

It is a question of law only where the evidence on the question is substantially undisputed.

Enciso, supra.

Sherman v. United States, 356, U. S. 369 (1958).

Unless it can be decided as a matter of law, the issue of whether a defendant has been unlawfully entrapped is for the jury as part of its function of determining the guilt or innocence of the accused.

Sherman , supra.

Carson v. United States, 310 F.2d 558 (9th Cir. 1962).

Rush v. United States, 370 F.2d 520 (8th Cir. 1967).

It is clear from the record that this was not a case of entrapment as a matter of law. That the trial judge had rejected entrapment as a defense is also clear. Just prior to sentencing the defendants, Judge Youngdahl said:

> "It is my opinion, counsel, so far as the defendant, Carbajal, is concerned, this wasn't a one-shot thing. He knew the routine pretty well, and I don't share your opinion that it was an isolated thing. I am under the impression he was pretty much of a runner and he was fortunate to get away with things before." (R.T. 205).

Looking at the case in the light most favorable to the defendants, the evidence as to entrapment was at best conflicting. This being so, the judge properly did not decide the issue as one of law, but rather submitted it to the trier of fact with the proper instruction to the effect that once the issue had been raised, the government had the burden of proving beyond a reasonable doubt that Carbajal was not entrapped. (R.T. 194-195).

"Unlawful entrapment is the solicitation of an otherwise innocent

> person to commit a crime solely for the purpose of prosecution. It arises where the criminal purpose or design originated in the minds of government officials and such criminal purpose or design is implanted in the mind of an otherwise innocent person, the object being his prosecution."
>
> Rogers v. United States, 367 F.2d 998 (8th Cir. 1966).
>
> "It is well settled that the fact that the officers or employees of the government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution. Artifice and strategem may be employed to catch those engaged in criminal enterprises . . . . A different question is presented when the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute."
>
> Sorrells v. United States, 287 U.S. 435 at 441-442 (1932).

The record contains much testimony supporting the contentions of the government that appellant Carbajal was not an innocent person, that he had a predisposition to commit the crime, and that hence he was not entrapped illegally.

At the time of their first meeting Carbajal approached agent Halcon and asked him if he wanted to buy "cheva" (R. T. 33, 34). "Cheva" is a slang expression for heroin, used in the Mexican drug traffic (R. T. 39). Agent Halcon testified that Carbajal offered him European heroin for

future delivery, and quoted a price of $12,000 per kilo (R.T. 35). This is a good indication that Carbajal was not just on a "one-shot" venture, but was rather an active participant in the Mexican drug traffic. Carbajal's testimony showed a familiarity with the city of Calexico, even though he denied having been there before (R.T. 126, 127). It is apparent from the verdict that the jury believed the government testimony and found it to have discharged the burden of proof imposed.

The verdict of the jury must be sustained if there is substantial evidence, taking the view most favorable to the government.

Glasser v. United States, 315 U. S. 60, 80 (1942).

Sherman v. United States, 241 F.2d 329 (9th Cir. 1957).

Appellant Carbajal also paradoxically raises as a defense the claim that while he admits the intent to transport the heroin between cities in Mexico, he at no time had any intention of entering the United States and violating its laws, until allegedly he was induced to do so by agents of the United States. (A. B. 3).[3]

No case was found precisely in point. However, several provide guidance by analogy. In United States v. Becker, 62 F.2d 1007 (2nd Cir. 1933), the appellant argued that although engaged in the commission of local obscenity crimes, he had not committed the Federal crimes charged until entrapped into doing so by postal inspectors. The Court of Appeals, at page 1009, rejected the argument, Judge Learned Hand writing as follows:

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[3] "A. B." refers to Appellant's Brief.

> "The crimes in which he had been engaged were offenses against another sovereign, though the distinction was not suggested at the trial. If the excuses for instigation includes the accused's 'predisposition' to the crime charged, the point is a bad one anyway. One who distributes obscene pamphlets locally is not morally averse to sending them to another state .... The whole doctrine derives from a spontaneous moral revulsion against using the powers of government to beguile innocent though ductile, persons into lapses which they might otherwise resist. Such an emotion is out of place, <u>if they are already embarked in conduct morally indistinguishable</u>, and of the same kind . . . . We conclude that Becker was not 'entrapped' into the crime." (Emphasis added.)

To the same effect in <u>United States v. Edwards</u>, 366 F.2d 853 (2nd Cir. 1966). In that case, entrapment was alleged because agents switched the place of an illegal transaction in securities from New York to New Jersey to make it an interstate offense. The court held, however, that the government did no more than afford the opportunity and facilities for the commission of the offense charged, and that the participants were awaiting any propitious opportunity, and never considered themselves limited by New York's boundaries. Therefore, there was no illegal entrapment.

In <u>Sherman v. United States</u>, 241 F.2d 329 (9th Cir. 1957), cert. den., 354 U. S. 911, rehearing denied, 355 U. S. 852 (1957), this court cited

Becker, supra, to the effect that an entrapment defense is not supported where the evidence shows a design to commit the crime charged "or similar crimes. . . ."

Appellant's claim that he was willing to commit a crime in Mexico, but not in the United States is belied by common sense. The heroin was transported from the interior of Mexico to Mexicali, on the United States - Mexico border. He was willint to sell to an American buyer. It is almost a matter of judicial notice that narcotics moving along this route are never intended to come to rest in Mexicali, but in fact are destined to reach the lucrative U. S. market.

It is submitted that the law of entrapment was designed to protect the innocent man who is lured into the commission of crime by the Government, not the guilty man already engaged in similar criminal activities. The facts of this case leave little question as to appellant Carbajal's being a member of the latter.

B. THE EVIDENCE AGAINST APPELLANT VEGA WAS SUFFICIENT TO CONVICT.

It is well settled that on appeal, the facts are to be interpreted most favorable to the government.

Glasser v. United States, 315 U. S. 60 (1942).

Stein v. United States, 337 F.2d 14 (9th Cir. 1964).

While no conspiracy between appellants Vega and Carbajal was charged in the indictment, the facts as determined by the jury leave no doubt

as to the existence of one, this being the case, appellant Carbajal's statements to agent Halcon concerning Vega's participation are admissible against him (Vega) as admissions of a co-conspirator in furtherance of the conspiracy.

See: Shibley v. United States, 237 F.2d 327 (9th Cir. 1956)

Barrett v. United States, 171 F.2d 721, 722 (9th Cir. 1949).

Lutwak v. United States, 344 U. S. 604 (1952).

Agent Halcon testified that Carbajal told him that the heroin was being brought across the border by a water truck driver (R.T. 35, 48). Later, Vega testified: "I am a salesman of drinking water in Mexicali". (R.T. 136). He again admitted he was a water truck driver, but denied that appellant Carbajal knew this. (R.T. 142).

Throughout his testimony, appellant Carbajal denied that Vega was aware of the importation of the heroin. He stated that he "put the merchandise in the car without him knowing it . . . ." (R. T. 125), that Vega did not know the matter was contraband (R.T. 126), and that Vega did not know heroin was placed in his car. (R.T. 135).

Both appellants also testified that Vega was not at his car when Carbajal removed the contraband (R.T. 127-128, 140-141). This testimony was contradicted by the testimony of Agents Halcon and Landa. Agent Halcon testified that Vega told him, "the thing is in the car" and "I will get it", and then proceeded to the car with Carbajal. (R. T. 36). Agent Landa, who was observing the transaction from across the street, testified that both Vega and Carbajal were at Vega's car, first opening the trunk, then the passenger's door.

(R. T. 76). Vega then walked about fifteen feet toward Agent Halcon's vehicle which was only thirty feet away. (R. T. 82).

The verdict of the jury then, had to turn on whether they believed the testimony of the experienced government agents, or that of the two appellants, men in fear of the loss of their freedom. It is obvious that the many contradictions in appellant's testimony impeached them as witnesses, and caused the jury to doubt the credibility of what they said. Since the jury had the opportunity of observing the demeanor of the witnesses, it is submitted that their verdict should not be overturned barring overwhelming evidence in appellants' favor.

It is patently unbelievable that appellant Vega could be ignorant of the transaction and yet raise no question when Carbajal appeared at the park with agent Halcon, took the coffee can containing the contraband from the car while Vega was present, and then proceeded to enter Halcon's car for the actual sale.

Appellant Vega alleges that the government failed to prove possession of the heroin by him.

Possession may be actual or constructive, sole or joint, and may be proved by circumstantial evidence.

Hernandez v. United States, 300 F. 2d 114 (9th Cir. 1962).

In this case, Vega's custody of the car and the fact that he was driving are circumstantial evidence that he had knowing possession of the contraband. When this was bulwarked by the direct evidence presented by government agents as to Vega's comments and his presence at the car when the contraband was removed, it is clear that the jury could find substantial evidence on which to base a finding of possession necessary for conviction.

C. THE APPEAL WAS NOT TIMELY.

Rule 37(a)(2), Federal Rules of Criminal Procedure provides:

"An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion . . . ."

In this case, judgment as to both defendants was entered on September 30, 1966. On that same date, a motion for a new trial with respect to appellant Vega alone was made, and summarily denied by the trial court. Notice of appeal was not filed until November 7, 1966, thirty-eight days after judgment, and far beyond the allowable period. Appellants were represented at all times by competent counsel in the person of Mr. Michael S. Hegner.

Timely notice of appeal must be filed in District Court to confer jurisdiction in the Court of Appeals.

Coppedge v. United States, 369 U.S. 438 (1962).

The Court of Appeals has no jurisdiction of appeals where notice required by Rule 37(a)(2) is not filed within the time specified.

United States v. Creighton, 359 F.2d 429 (3rd Cir. 1966).

The Court of Appeals has no authority in the absence of a timely appeal, to vacate a judgment of conviction.

Russell v. United States, 308 F.2d 79 (9th Cir. 1962)

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Shelby R. Gott
SHELBY R. GOTT